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**February 2, 2000**

**VIA FACSIMILE & FIRST CLASS MAIL**

**Ami Antoine, Esquire (3RC43)  
Senior Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103**

**RE: 68th Street Dump Site**

**Dear Ms. Antoine:**

**This responds to your letter of January 31, 2000. Our letter of January 28th was programmed for transmission by facsimile prior to receipt of your letter. Our review of your letter did not require a material change to our correspondence.**

**Perhaps it would be appropriate to express, in a reasoned fashion, our concern as it relates to our advices to our client Pulaski and 68th Street L.L.C. We are fully aware that your proposed February visit is not for sampling purposes but to determine where sampling will take place the following month.**

**The present status of this matter, as far as we know, is that the subject site, along with significant other neighboring properties, has been proposed for N.P.L. listing by EPA by notice in the Federal Register dated January 19, 1999. To support the listing, which is a rulemaking process, EPA must produce a record of supporting documentation which is analyzed through the HRS ranking system. The proposed decision published in the Federal Register, which was presumably based upon the existing record, announced that the agency had tentatively determined**

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that the site qualified under the HRS ranking system to become a N.P.L. site. The comment period for the proposed listing ended March 22, 1999. Since that notification, we have had no further advices or notices from EPA until the most recent request, essentially to perform additional sampling some time this spring.

Our initial response was to inquire what is the status of the N.P.L. listing and how the additional testing relates to that on-going rulemaking. We generally also asked for the specific purpose of the proposed new round of sampling. EPA responded that certain issues arose within the N.P.L. process as the basis for the sampling. At no time did EPA indicate what issues arose, what is to be sampled for, or what type of sampling is to be accomplished; nor has the agency advised whether there has been a change in status of EPA's tentative determination. One would believe that a property owner subject to this process would be advised of these salient factors voluntarily. Instead, the agency has asserted that they could not engage in *ex parte* discussions and that specific information would be unavailable. It appears that the agency has backed off of this assertion at this time.

It is our understanding of the law that a proposed rulemaking is based upon the record as accumulated to support the agency's determination. The record cannot be supplemented by *post hoc* rationalizations or additional materials to justify a prior decision. See *Citizens to Preserve Overbrook Park, Inc. v. Volpe*, et al. 401 U.S. 402 (1971). See also *National Oilseed Processors Ass'n v. Carol Browner, Administrator, and EPA*, et al., 924 F. Supp. 1193 (D.D.C.1996). It would appear, therefore, that the agency cannot supplement the record at this point in an effort to justify a decision. It will be necessary to issue a public notice, reopen the record, provide the reasons for reopening the record, and to initiate a new rulemaking or a modified rulemaking. The cleaner course of action would be to initiate a totally new rulemaking and abandon the tentative decision announced January 19, 1999. The ultimate decision should not be tainted by the tentative determination previously made, based upon a different record

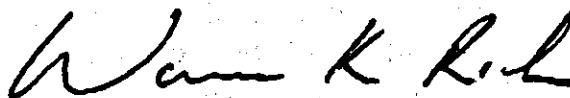
Unless you can provide the information that we have requested and convince us that the actions taken by EPA are appropriate given the fact that such proposed actions are encompassed within a rulemaking process initiated on the 19th day of

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January, 1999, we have no alternative but to recommend refusal of the access.<sup>1</sup> As I have previously expressed, we don't know why EPA seeks to take further samples; we don't know the purpose, we don't know how it relates to the current rulemaking; but worst of all, the agency refuses to provide this information.

Yours very truly,



Warren K. Rich

WKR:rw

cc: Kenneth R. Binnix

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<sup>1</sup> Please be advised that the consent form provided in your January 31, 2000 letter is unacceptable. We would never recommend that our client agree to the EPA self-serving characterization contained within the last sentence of that consent form.

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**FACSIMILE TRANSMITTAL**

TO: Ami Antoine  
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FAX: (410) 267-5901

DATE: February 2, 2000

4 pages (including this cover sheet)

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